

DANIEL SMALL, CAROLYN SMALL, and) 3:12-cv-00395-HDM-VPC
WILLIAM CURTIN, Individually and)
on Behalf of All Other Persons)
Similarly Situated,) ORDER
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Plaintiffs,)
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vs.)
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UNIVERSITY MEDICAL CENTER OF)
SOUTHERN NEVADA,)
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Defendant.)
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On November 5, 2012, plaintiffs filed an unauthorized surreply (#31). On November 13, 2012, defendant filed an unauthorized reply to the plaintiffs' surreply (#32). Because plaintiffs did not seek leave of court to file the surreply, the surreply does not address new arguments raised by defendant in its reply, and the surreply is in any event unnecessary for the court to consider in deciding the

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1 motion to dismiss, plaintiffs' surreply (#31) is hereby **STRICKEN**.
2 Defendant's reply to plaintiffs' stricken surreply (#32) is also
3 therefore **STRICKEN**.

4 In its motion to dismiss, defendant argues that plaintiffs'
5 Fair Labor Standards Act ("FLSA") claims are subject to the
6 grievance-arbitration procedure of their collective bargaining
7 agreement ("CBA"). However, FLSA rights are separate and
8 independent from any rights conferred by a CBA, and the Ninth
9 Circuit has specifically held that "employees are entitled to take
10 their FLSA claims to court regardless of whether those claims may
11 also be covered by the grievance-arbitration procedure."
12 *Albertson's, Inc. v. United Food & Comm. Workers Union, AFL-CIO &*
13 *CLC*, 157 F.3d 758, 760-62 (9th Cir. 1998); *see also Barrentine v.*
14 *Arkansas-Best Freight Sys.*, 450 U.S. 728, 740-45 (1981).
15 Accordingly, the mere fact that a CBA contains a grievance-
16 arbitration procedure covering pay and overtime pay claims does
17 not, of itself, bar the plaintiffs from bringing their FLSA claims
18 to court.

19 Nonetheless, defendant argues, a CBA may require employees to
20 arbitrate their statutory rights. The Supreme Court has held that
21 any agreement to submit statutory claims to the grievance and
22 arbitration procedure contained in a CBA - and thus to waive the
23 right to a judicial forum for such claims - must be "clear and
24 unmistakable." *Wright v. Univ. Maritime Serv. Corp.*, 525 U.S. 70,
25 79-81 (1998). While defendant asserts that "the CBA requires the
26 union and its members, including plaintiffs, to submit pay and
27 overtime claims, including the Fair Labor Standards Act ("FLSA")
28 and state wage and hour statutes involved here, to the mandatory

1 grievance-arbitration procedures contained in the CBA," (Def. Reply
2 2), it fails to identify any language in the CBA requiring such.
3 Instead, it cites broadly to Article 9 of the CBA, which requires
4 "[a]ll grievances" to be submitted to the grievance-arbitration
5 procedure outline in the article. A "grievance" is defined, in
6 relevant part, as "a dispute regarding the interpretation and
7 application of the provisions of the Agreement . . . alleging a
8 violation of the terms and provisions of this Agreement." (CBA
9 Art. 9, ¶¶ 1-2). This language does not clearly and unmistakably
10 require the plaintiffs to submit their statutory claims to the
11 CBA's grievance-arbitration procedure. In fact, it is limited to
12 disputes arising out of the agreement itself. Defendant has failed
13 to point to any other language in the CBA constituting a "clear and
14 unmistakable" waiver of plaintiffs' rights to bring their statutory
15 claims in this court, and, at this juncture, there is nothing to
16 distinguish this case from *Albertson's*, 157 F.3d 758. Accordingly,
17 the motion to dismiss plaintiffs' FLSA claims is **DENIED WITHOUT**
18 **PREJUDICE**.

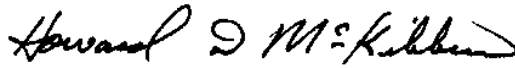
19 As to plaintiffs' state law claims, which defendant argues are
20 preempted by the Labor Management Relations Act ("LMRA"), the court
21 cannot at this time determine whether such claims are grounded in
22 the provisions of the CBA or substantially dependent on the CBA and
23 thus require interpretation of the CBA. See *Burnside v. Kiewit*
24 *Pac. Corp.*, 491 F.3d 1053, 1058-60 (9th Cir. 2007). The motion to
25 dismiss plaintiffs' state law claims is therefore **DENIED WITHOUT**
26 **PREJUDICE** to renew at the close of discovery as a motion for
27 summary judgment.

28 In accordance with the foregoing, the defendant's motion to

1 dismiss (#23) is **DENIED WITHOUT PREJUDICE** to renew as a motion for
2 summary judgment at the close of discovery. The plaintiffs'
3 unauthorized surreply (#31) and the defendant's reply thereto (#32)
4 are hereby **STRICKEN**.

5 IT IS SO ORDERED.

6 DATED: This 14th day of November, 2012.

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9 UNITED STATES DISTRICT JUDGE
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